

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

11 WES W. JOHNSON,) Civil No. 09cv1262 L (NLS)
12 Plaintiff,) **ORDER GRANTING MOTION TO**
13 v.) **DISMISS [doc. #11] WITH LEAVE**
14 HOMECOMINGS FINANCIAL, *et al.*,) **TO AMEND**
15 Defendants.)
16 _____)

17 Defendants GMAC Mortgage, LLC; Homecomings Financial, LLC; Executive Trustee
18 Services, Inc.; Deutsche Bank National Trust Company; Deutsche Bank Trust Company
19 Americas as Trustee for RALI 2007QA1; and Pite Duncan, LLP move to dismiss plaintiff's 19-
20 claim verified complaint under Federal Rule of Civil Procedure 12(b)(6). The motion has been
21 fully briefed. The Court finds this matter suitable for determination on the papers submitted and
22 without oral argument pursuant to Civil Local Rule 7.1(d)(1).

23 **1. Background**

24 Plaintiff refinanced his mortgage loan on residential property located in Nevada with
25 defendant Homecomings Financial on November 28, 2006. On June 25, 2008, plaintiff "notified
26 Homecomings and Executive that he was rescinding the Loan pursuant to TILA . . ." (Compl.
27 at ¶ 16.) On November 19, 2008, plaintiff's property was subject to a foreclosure sale and the
28 property was transferred to Deutsche Americas and Deutsche National.

1 The claim-laden complaint asserts causes of action under the Fair Credit Reporting Act
 2 (“FCRA”), the Fair Debt Collection Practices Act (“FDCPA”) the Truth in Lending Act
 3 (“TILA”); breach of contract; breach of the covenant of good faith and fair dealing; abuse of
 4 process; invasion of privacy; tort in se based on violation of TILA, FCRA, FDCPA, California
 5 Business and Professions Code § 17200, California Civil Code §§ 1708 and 43; intentional
 6 infliction of emotional distress; negligent infliction of emotional distress; violation of California
 7 Business and Professions Code § 17200; quiet title; wrongful foreclosure; slander of title;
 8 general negligence; conversion; unjust enrichment/quasi-contract; constructive trust/equitable
 9 lien; and injunctive relief.

10 “The focus of any Rule 12(b)(6) dismissal . . . is the complaint.” *Schneider v. California*
 11 *Dept. of Corrections*, 151 F.3d 1194, 1197 n.1 (9th Cir. 1998). A complaint must contain a
 12 “short and plain statement of the claim showing that the pleader is entitled to relief.” FED. R.
 13 CIV. P. 8(a). Dismissal is warranted under Rule 12(b)(6) where the complaint lacks a
 14 cognizable legal theory or where the complaint presents a cognizable legal theory yet fails to
 15 plead essential facts under that theory. *Robertson v. Dean Witter Reynolds, Inc.*, 749 F.2d 530,
 16 534 (9th Cir. 1984).

17 Counsel for plaintiff appears unaware that in two recent opinions the Supreme Court
 18 established a more stringent standard of review for 12(b)(6) motions. *See Ashcroft v. Iqbal*, 129
 19 S.Ct. 1937 (2009); *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955 (2007). To survive a motion
 20 to dismiss under this standard, “a complaint must contain sufficient factual matter, accepted as
 21 true, to ‘state a claim to relief that is plausible on its face.’” *Iqbal*, 129 S. Ct. at 1949 (citing
 22 *Twombly*, 550 U.S. at 570). A motion to dismiss should be granted “if plaintiffs have not
 23 pleaded ‘enough facts to state a claim to relief that is plausible on its face.’” *Williams ex rel.*
 24 *Tabiu v. Gerber Products Co.*, 523 F.3d 934, 938 (9th Cir. 2008) (quoting *Bell Atlantic Corp. v.*
 25 *Twombly*, 127 S. Ct. 1955, 1974 (2007)). “Factual allegations must be enough to raise a right
 26 to relief above the speculative level.” *Id.* “While a complaint attacked by a Rule 12(b)(6)
 27 motion to dismiss does not need detailed factual allegations, a plaintiff’s obligation to provide
 28 the ‘grounds’ of his ‘entitlement to relief’ requires more than labels and conclusions, and a

1 formulaic recitation of the elements of a cause of action will not do.” *Twombly*, 127 S. Ct. at
 2 1964-1965. The court does not have to accept as true any legal conclusions within a complaint,
 3 although conclusions can help frame a complaint. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949-50
 4 (2009).

5 In determining the propriety of a Rule 12(b)(6) dismissal, a court may not look beyond
 6 the complaint for additional facts, *e.g.*, facts presented in plaintiff’s memorandum in opposition
 7 to a defendant’s motion to dismiss or other submissions. *United States v. Ritchie*, 342 F.3d 903,
 8 908 (9th Cir. 2003); *Parrino v. FHP, Inc.*, 146 F.3d 699, 705-06 (9th Cir. 1998); *see also* 2
 9 MOORE’S FEDERAL PRACTICE, § 12.34[2] (Matthew Bender 3d ed.) (“The court may not . . . take
 10 into account additional facts asserted in a memorandum opposing the motion to dismiss, because
 11 such memoranda do not constitute pleadings under Rule 7(a).”).

12 DISCUSSION

13 The central premise of plaintiff’s complaint is that by giving notice of rescission of the
 14 mortgage loan he executed, the loan was in fact rescinded. And as a result of the rescission, the
 15 foreclosure of the property and all subsequent activity related to his credit reports were
 16 wrongful. Plaintiff’s TILA cause of action is the sole basis for rescission of the loan agreement.
 17 In sum, plaintiff’s allegations concerning TILA are: “Homecomings has negligently and
 18 willfully violated TILA and its regulations.” (Compl. at ¶ 35.) This is a woefully inadequate
 19 allegation – it fails to provide any ground for his entitlement to relief and instead is a legal
 20 conclusion. As noted above, factual allegations “require[] more than labels and conclusions, and
 21 a formulaic recitation of the elements of a cause of action will not do.” *Twombly*, 127 S. Ct. at
 22 1964-1965. In his opposition to the motion to dismiss, plaintiff contends that his June 25, 2008
 23 letters to Homecomings and ETS indicate that he failed to receive two notices of his right to
 24 rescind which triggered his TILA claim. But plaintiff’s letters of notice of rescission merely are
 25 attached to the complaint and do not constitute a pleading. Plaintiff’s TILA claim fails to
 26 provide any facts to state a claim to relief that is plausible on its face and must be dismissed.

27 Additionally, under 15 U.S.C. Section 1635(f), “[a]n obligor’s right of rescission shall
 28 expire three years after the date of consummation of the transaction *or upon the sale of the*

1 *property, whichever occurs first . . .*" Plaintiff alleges the foreclosure sale occurred on
 2 November 19, 2008, therefore, any right to rescission has expired.

3 To the extent plaintiff seeks damages under TILA, plaintiff's cause of action for damages
 4 is subject to a one-year statute of limitations, 15 U.S.C. § 1640(e), which runs from the time the
 5 loan transaction is consummated. *King v. State of California*, 784 F.2d 910, 915 (1986). Here,
 6 the loan was consummated on November 28, 2006, and absent equitable tolling, it is time barred.
 7 Under Ninth Circuit law, equitable tolling of a TILA claim for damages can be appropriate in
 8 certain circumstances. As currently pleaded, however, plaintiff's TILA claim for damages is
 9 time barred because plaintiff fails to allege sufficient facts to support equitable tolling. To the
 10 extent plaintiff alleges that his discovery of the violation was delayed because he was defrauded
 11 or misled by defendants, he must allege the circumstances constituting fraud with particularity
 12 required by Federal Rule of Civil Procedure 9(b) and all remaining facts as required by Rule
 13 8(a).

14 Plaintiff's complaint, in general, fails to meet the pleading standards of *Twombly* and
 15 *Iqbal*. All of the remaining causes of action are nothing more than "labels and conclusions, and
 16 a formulaic recitation of the elements of a cause of action . . ." *Twombly*, 127 S. Ct. at 1964-
 17 1965. As *Twombly* asserts, this is insufficient.

18 Further, plaintiff bases his FDCPA and FCRA claims on reporting inaccuracies that stem
 19 from his purported rescission. Because his rescission claim is dismissed, all claims derived from
 20 that claim must be dismissed.

21 Finally, the Court notes that rather than address defendants' arguments concerning why
 22 plaintiffs' state statutory and common law claims must be dismissed, plaintiff chose not to
 23 address defendants' contentions and as a result, plaintiff has waived any opposition he may have
 24 to those arguments. *See, e.g., City of Arcadia v. E.P.A.*, 265 F. Supp.2d 1142, 1154, n. 16 (N.D.
 25 Cal. 2003). Accordingly, the California statutory and common law claims plaintiff has asserted
 26 in the complaint are also subject to dismissal.

27 Based on the foregoing, defendants' motion to dismiss is **GRANTED**. The Court must
 28 consider whether a motion to dismiss should be granted with leave to amend. *See Schreiber*

1 *Distrib. Co. v. Serv-Well Furniture Co., Inc.*, 806 F.2d 1393, 1401 (9th Cir. 1986). Rule 15
2 advises the court that leave to amend shall be freely given when justice so requires. Fed. R. Civ.
3 P. 15(a). "This policy is to be applied with extreme liberality." *Eminence Capital, LLC v.*
4 *Aspeon, Inc.*, 316 F.3d 1048, 1051 (9th Cir. 2003) (internal quotation marks and citation
5 omitted). Dismissal with prejudice and without leave to amend is not appropriate unless it is
6 clear that the complaint could not be saved by amendment. *Id.* at 1052. Accordingly, plaintiff is
7 **GRANTED LEAVE TO AMEND**. If plaintiff intends to amend the complaint, he must do so
8 within 20 days of the filing of this Order. Further, plaintiff is reminded of his obligations under
9 Federal Rule of Civil Procedure 11. By signing an amended complaint, plaintiff certifies he has made
10 reasonable inquiry and has evidentiary support for his allegations and that for violation of this rule the
11 court may impose sanctions sufficient to deter repetition by plaintiff or others. FED. R. CIV. P. 11. In
12 particular, plaintiff must abide by the prohibition on filing pleadings that are "presented for any
13 improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of
14 litigation." FED. R. CIV. 11(b)(1).

15 **IT IS SO ORDERED.**

16 DATED: August 5, 2010

17 
18 M. James Lorenz
United States District Court Judge

19 COPY TO:

20 HON. NITA L. STORMES
UNITED STATES MAGISTRATE JUDGE

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22 ALL PARTIES/COUNSEL

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